STATE OF MAINE BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT

Docket No. OJ-18-1

IN THE MATTER OF REQUEST FOR OPINION OF THE JUSTICES

BRIEF OF OXFORD HILLS CHAMBER OF COMMERCE

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STATEMENT OF THE FACTS

Maine's House of Representatives asks this Court for an advisory opinion as to whether or not the Houlton Band of Maliseet Indians can conduct gambling on tribal lands. This question comes in the context of repeat failed efforts in the House to authorize tribal gaming. Just this past year, for example, Maine's House of Representatives rejected LD 1201, An Act to Authorize Tribal Gaming.¹ Only after the defeat of LD 1201, did the House refer this question to the Court on August 30:

Does the decision of the Supreme Court of the United States in California v. Cabazon Band of Mission Indians, 480 U.S. 202, (1987) allow the Houlton Band of Maliseet Indians, a federally recognized Indian tribe, to conduct gambling on tribal trust land without permission to do so from the State?

This question is not tied to any pending legislation or other concrete action under consideration in the House. In fact, there is currently no pending legislation before the House concerning tribal gaming or anything else, since the House adjourned *sine die* on September 13, 2018.

The Oxford Hills Chamber of Commerce is interested in this question because Oxford County is a center of legal and responsible gaming in Maine. The Chamber's involvement here is intended to help the State approach gaming

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¹ See 128th Maine Legislature, Display re. LD 1201, An Act to Authorize Tribal Gaming, online at https://legislature.maine.gov/legis/bills/display_ps.asp?LD=1201&snum=128.

through a coherent and thoughtful process that promotes economic development and the public welfare.

SUMMARY OF ARGUMENT

The House seeks an advisory opinion on the abstract legal rights of the Houlton Band of Maliseet Indians. This question does not constitute a "solemn occasion" pursuant to article VI, section 3 of the Maine Constitution, at least because (a) it concerns the hypothetical rights of a third party outside state government; and (b) the question is not of "unusual exigency" or "live gravity" since the House is not in session, there is no legislation pending before it, and there is no indication that the Maliseet tribe has taken any steps to conduct gambling on its land.

ARGUMENT

A. A 'solemn occasion' generally exists only if nine factors are satisfied.

In 2017, in response to questions from the Maine Senate surrounding ranked choice voting, this Court listed the "several guideposts" (nine total) necessary to determine the existence of a solemn occasion. *Opinion of the Justices*, 2017 ME 100, ¶¶ 21 - 31, 162 A.3d 188. A solemn occasion generally exists only if each of these nine factors is satisfied.² *Id.* ¶¶ 39-47. As argued below, at least three of

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² This Court has recognized a solemn occasion in one instance when one of these nine factors was not satisfied, but in that situation where "the State of Maine [was] faced with potential uncertainty in its election process" this Court found the existence of a solemn occasion "despite

these factors are not satisfied here: the question will not resolve any doubts concerning the authority of the House of Representatives, there is no unusual exigency, and the question presented is not of live gravity.

B. The question presented will not resolve any doubts concerning the authority of the House of Representatives. Rather, it concerns the hypothetical rights of a private third party, the Houlton Band of Maliseet Indians.

This Court will not offer an advisory opinion unless "the body posing the question has serious doubts as to its own constitutional or statutory power and authority to take a necessary action." *Opinion of the Justices*, 2012 ME 49, ¶ 6, 40 A.3d 930. A question presents a solemn occasion, for example, "when the House, Senate or Governor seeks an opinion as to the constitutionality of legislation currently pending before that body because, in those instances, the questioner seeks our guidance in determining its authority to approve the pending bill." *Opinion of the Justices*, 2017 ME 100, ¶ 29, 162 A.3d 188. To the contrary, a question of the House cannot present a solemn occasion when "the record is silent with regard to the need for the discharge of any duties of the House of Representatives". *Opinion of the Justices*, 2012 ME 49, ¶ 9, 40 A.3d 930 (in response to questions from the House concerning constitutional restrictions placed on the Treasurer of State, when

the principles that would ordinarily cause us to decline to do so." *Opinion of the Justices*, 2017 ME 100, ¶¶ 47, 55, 162 A.3d 188.

there was no evidence that the Treasurer was in breach of any of potential restrictions).

The question advanced by the House here does not concern the rights of the House, Senate or Executive. Rather it asks the Court to decide whether the Houlton Band of Maliseet Indians has legal authority to conduct gambling on tribal trust land. This Court has never found the existence of a solemn occasion when the hypothetical rights of a private third party, rather than the concrete authority of a branch of government, is at issue. If this Court were to find that this question presents a solemn occasion, it would open the proverbial floodgates for third parties outside of state government to obtain advisory opinions on their legal rights and obligations.

The House may argue that this opinion is necessary to determine whether it needs to pass legislation in a future session authorizing gambling on Maliseet land. But even framed in this manner, the question does not concern the legal authority of the House of Representatives. Whether the House should pass a law at some time in the future is a matter of policy outside the province of the courts, and an entirely different question than whether it has the legal authority to do so.

C. The question presented is not of unusual exigency, nor is it a question of live gravity, since it concerns the hypothetical never-exercised rights of the Houlton Band of Maliseet Indians.

A question presents a solemn occasion only if it "presents an unusual exigency" and is "one of live gravity, that is, one of instant, not past nor future, concern." *Opinion of the Justices*, 2017 ME 100, ¶¶ 22, 23, 162 A.3d 188. These two factors—'unusual exigency' and 'live gravity'—are related since a question "concerns a matter of live gravity and unusual exigency" if "the body asking the question requires judicial guidance in the discharge of its obligations." *Opinion of the Justices*, 2015 ME 27, ¶ 18, 112 A.3d 926 (refusing to find solemn occasion where Governor sought advice on his authority to obtain private counsel). This Court has clarified that, while these questions are similar, "unusual exigency...is subtly distinct in that it…infuses an element of temporal consideration." *Opinion of the Justices*, 2017 ME 100, ¶ 22, 162 A.3d 188.

There is nothing urgent or "live" about the House's inquiry. The House is adjourned. It will not reconvene until it is reconstituted by November's elections as the 129th Legislature. There is no pending legislation. And the House would be unable to receive or act upon any answer provided by this Court. For these reasons alone, this is not a solemn occasion. *See Questions Submitted by the House of Representatives*, 95 ME 564, *12-13 (1901)(because the House was adjourned "no…answer to the questions submitted could be of any value or assistance to the

House" and "could not even be submitted to the House"). At most, any answer provided by the Court "might be useful guidance to some future House of Representatives" but "[a]n opinion given upon this ground would be an unwarrantable interference with the duties and functions of such future House of Representatives." *Id*.

Further demonstrating that the question is neither live nor urgent, there is no indication that the Houlton Band of Maliseet Indians has ever actually conducted gambling on its lands, or taken any steps to conduct gambling. Even if the House could get around the fact that this question concerns the rights of a constituent outside state government, purely hypothetical questions concerning action that someone could take in the future do not present the "unusual exigency" of a solemn occasion. *See Opinion of the Justices*, 2015 ME 27, ¶ 25, 112 A.3d 926 ("Because there is nothing before us indicating that the Governor or the Department was deprived of private counsel when the Attorney General was not available, or that such a situation is likely to arise, no 'unusual exigency' exists").

CONCLUSION

The question referred by the House does not present a "solemn occasion" since it concerns the hypothetical rights of a third party rather than a question currently pending before the House. If the Houlton Band of Maliseet Indians wishes to determine its legal rights, it could certainly pursue other avenues to

create a live case or controversy and bring this matter before the courts. It cannot, however, obtain an advisory opinion by first passing the question through the House of Representatives.

October 12, 2018

Respectfully Submitted,

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